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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re I.B. et al., Persons Coming Under the  
Juvenile Court Law.

H039359  
(Santa Clara County  
Super. Ct. No. JD21533)

SANTA CLARA COUNTY  
DEPARTMENT OF FAMILY AND  
CHILDREN'S SERVICES,

Plaintiff and Respondent,

v.

M.B.,

Defendant and Appellant.

Appellant M.B. is the biological father of fraternal twins A.B. and I.B., the children who are the subject of this dependency proceeding. Appellant appeals from the denial of his motion to be declared the presumed father of the twins, arguing that he is a presumed father under the standard articulated in *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*). As set forth below, we will affirm the order denying appellant presumed father status.

## **FACTUAL AND PROCEDURAL BACKGROUND**

A.B. and I.B. were born in October 2012 at 31 weeks of gestation. The twins had low birth weights, and they spent several weeks in the Neonatal Intensive Care Unit (hereafter “NICU”).

On November 19, 2012, the Santa Clara County Department of Family and Children’s Services (hereafter “the Department”) filed a dependency petition pursuant to Welfare and Institutions Code section 300, alleging that the twins were at risk of harm “due to the mother’s chronic and on-going substance abuse.” That same day, the juvenile court issued warrants for the twins, and the twins were placed into protective custody at the hospital.

On November 20, 2012, the twins’ mother (hereafter “mother”) informed the Department that appellant was the twins’ father. The Department also learned that appellant had been arrested on drug-related charges on November 10, 2012, and that appellant was in custody due to those charges.

On December 12, 2012, the Department filed an amended dependency petition pursuant to Welfare and Institutions Code section 300. The petition stated that appellant was the twins’ alleged father. In addition to the previous allegations, the petition asserted that appellant had an extensive criminal history, suffered from substance abuse, was currently incarcerated and thus unable to care for the twins, and “knew or should have known about the mother’s substance abuse during her pregnancy with the twins.”

Genetic testing confirmed that appellant was the twins’ biological father. Accordingly, on January 3, 2013, the juvenile court declared appellant to be the biological father of the twins.

On January 3, 2013, appellant filed a JV-505 form requesting that the juvenile court enter a judgment of parentage. On February 1, 2013, appellant filed a motion to be

declared the twins' presumed father. The juvenile court held a paternity hearing on February 7, 2013.

At the paternity hearing, appellant testified that he and mother lived together as a couple throughout her pregnancy. Before the twins were born, appellant bought mother a car that would accommodate the twins' car seats. He also purchased "whatever [mother] needed" during her pregnancy. Before the twins' birth, appellant had a "clear intention" to be a father to the twins.

Appellant testified that he transported mother to approximately seven prenatal medical appointments. He "never went into the actual doctor's office" because he was a "little squeamish." Appellant also transported mother to the Medi-Cal office "quite a few times" so that mother "could maintain some medical care while she was pregnant." He knew that mother listed him as the twins' father on Medi-Cal forms, and he knew that this designation would require him "to pay back the [Medi-Cal] for any of the prenatal appointments or the delivery."

During mother's pregnancy, appellant and mother agreed that mother and the twins would live with the twins' maternal grandmother (hereafter "maternal grandmother") after the twins' birth. Appellant explained that maternal grandmother "is a stable, sober person who would love to provide for her grandchildren." He further explained that he "needed that kind of assistance" for the twins.

Appellant testified that he dropped mother off at the hospital on October 18, 2012 because she was using drugs and had problems with her blood pressure. The twins' due date was several weeks away, and appellant expected mother to stay in the hospital for the remainder of her pregnancy. Four days later, on October 22, 2012, appellant returned to the hospital, and staff members informed him that mother was in surgery. Six days after appellant left mother at the hospital, on October 24, 2012, a friend informed

appellant that mother had given birth. Appellant admitted that he never contacted mother during that six-day period because he “was upset with her.”

At some point after he learned of the twins’ birth, appellant went to the NICU in order to see the twins. Appellant testified that hospital staff members prohibited him from visiting the twins because hospital paperwork did not list him as the twins’ father. A nurse suggested that appellant write a note for mother, so appellant left a note asking mother to place him on the list of individuals authorized to visit the twins. A week after appellant left the note, he returned to the NICU. Hospital staff members again informed him that he could not see the twins because he was not on the list of authorized visitors. Appellant quickly left because security guards were approaching him. He contacted mother, and she told him she would immediately place him on the visitation list.

On November 2 or 3, 2012, mother placed appellant on the list of approved visitors. Appellant never visited the twins in the NICU after he was placed on the list. He explained that he failed to visit the twins because he was not “getting along” with mother. Appellant acknowledged that mother visited the twins every day while they were in the NICU.

Appellant admitted that he was arrested and taken into custody on November 10, 2012. He was still in custody at the time of the paternity hearing.

Mother testified at the paternity hearing, and she explained that she was “currently in a relationship” with appellant. She testified that she and appellant lived together during her entire pregnancy, and that she and appellant bought many items in anticipation of the twins’ birth. In particular, mother testified that appellant paid for diapers, formula, a stroller, baby clothes, and a car. She and appellant agreed that appellant would be an “active part” of the twins’ lives when they were born. Before the twins were born, appellant told his father, brother, sister-in-law, and friends that he was the twins’ father.

Mother testified that appellant was not present when the twins were born. Hospital records listed maternal grandmother as the father of the twins. Mother explained that maternal grandmother was listed as the father because maternal grandmother was present when the twins were born.

On cross-examination, mother admitted that she told a social worker that appellant was “not involved” in the twins’ lives. She also admitted that she spent a week at a homeless shelter while she was pregnant, and that appellant had dropped her off at the shelter.

The juvenile court admitted several documents into evidence at the paternity hearing. One of the documents, a jurisdiction/disposition report, stated that appellant was currently incarcerated as a result of illegal drug use and possession of methamphetamine and marijuana. That report also stated that appellant had not signed a declaration of paternity for the twins. Another document, an addendum to the foregoing report, stated that maternal grandmother volunteered to take guardianship of the twins. That report also stated that maternal grandmother told a social worker that appellant “does not want to be involved with the babies.”

At the conclusion of the paternity hearing, the juvenile court found mother’s testimony to be “incongruous and incredulous,” and it stated that it “gave little if no weight to her testimony.” The juvenile court found that appellant did not qualify as a presumed father under the standard articulated in *Kelsey S.*, and it denied appellant’s motion to be declared the twins’ presumed father.

Appellant filed a timely notice of appeal. This appeal followed.

### **DISCUSSION**

Appellant contends that we must reverse the order denying his motion for presumed father status because the evidence at the paternity hearing established that he is a presumed father as a matter of law. Specifically, appellant asserts that he is a presumed

father under the *Kelsey S.* standard because the evidence showed that he assumed parental responsibilities before the twins' birth and was prevented from continuing those responsibilities after their birth due to the conduct of mother and hospital staff members. In the alternative, appellant contends that the order denying his motion for presumed father status must be reversed because the juvenile court misunderstood the scope of *Kelsey S.*

We conclude that appellant failed to prove the three requirements for presumed father status under *Kelsey S.* We further conclude that the juvenile court's comments regarding *Kelsey S.* did not demonstrate a misunderstanding regarding the scope of *Kelsey S.* Accordingly, we will affirm the order denying appellant presumed father status.

#### ***Legal Principles Regarding Presumed Father Status***

"Dependency law recognizes four types of fathers: alleged, de facto, biological, and presumed." (*In re D.M.* (2012) 210 Cal.App.4th 541, 544.) "Only a presumed father is entitled to appointed counsel, custody . . . and reunification services." (*Ibid.*) "A biological father who is not a presumed father may be granted services but it is not mandatory." (*Ibid.*)

*Kelsey S.* established a standard by which an unwed biological father may qualify for presumed father status. (See *In re J.L.* (2008) 159 Cal.App.4th 1010, 1023 ["a father asserting valid *Kelsey S.* rights may effectively qualify for presumed father status as the result of his constitutional right to parent"].) In *Kelsey S.*, our Supreme Court concluded that California's statutory scheme for adoption "violates the federal constitutional guarantees of equal protection and due process for unwed fathers to the extent that the statutes allow a mother unilaterally to preclude her child's biological father from becoming a presumed father." (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849, italics omitted; see also *In re D.M.*, *supra*, 210 Cal.App.4th at p. 550 [noting that *Kelsey S.* "concluded that

the adoption statutes violate the biological fathers' right to due process and equal protection of the law"].) *Kelsey S.* further concluded: "If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent. Absent such a showing, the child's well-being is presumptively best served by continuation of the father's parental relationship." (*Kelsey S., supra*, 1 Cal.4th at p. 849.)

Three circumstances must be present for a biological father to qualify for presumed father status under *Kelsey S.*: "To satisfy the *Kelsey S.* criteria, a child's biological father must show he promptly stepped forward to assume full parental responsibilities for his child's well-being, the child's mother or some third party thwarted his efforts to assume his parental responsibilities, and that he demonstrated a willingness to assume full custody of the child." (*In re M.C.* (2011) 195 Cal.App.4th 197, 220, citing *Kelsey S., supra*, 1 Cal.4th at p. 849.) When determining whether the foregoing has been established, a "court should consider all factors relevant to that determination. The father's conduct both *before and after* the child's birth must be considered. Once he knows or reasonably should know of the pregnancy, he must promptly attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit. In particular, the father must demonstrate 'a willingness himself to assume full custody of the child—not merely to block adoption by others.' [Citation.] A court should also consider the father's public acknowledgement of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child." (*Kelsey S., supra*, 1 Cal.4th at p. 849, fn. omitted, italics in original; see also *In re M.C., supra*, 195 Cal.App.4th at p. 220.)

"*Kelsey S.* was not a dependency action. But the vast majority of appellate courts to have considered the issue have had no difficulty extending its holding to dependency

proceedings.” (*In re M.C.*, *supra*, 195 Cal.App.4th at p. 219.) We, like the majority of appellate courts, will apply the *Kelsey S.* standard when determining presumed father status in a dependency proceeding. (See *In re D.M.*, *supra*, 210 Cal.App.4th at p. 551 [noting that the *Kelsey S.* holding has been “extended to dependency proceedings”].)

### ***Burden of Proof and the Standard of Review***

“The party seeking to establish presumed parent status bears the burden of proof by a preponderance of evidence.” (*In re M.C.*, *supra*, 195 Cal.App.4th at p. 216.) “The burden is on a biological father who asserts *Kelsey S.* rights to establish the factual predicate for those rights.” (*In re Adoption of O.M.* (2008) 169 Cal.App.4th 672, 679.)

We apply the following standard of review when a juvenile court finds a failure of proof in a dependency proceeding: “[W]here the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant’s evidence was (1) ‘uncontradicted and unimpeached’ and (2) ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.’ [Citation.]” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

### ***The Evidence Does Not Compel a Finding in Favor of Appellant as a Matter of Law***

In the instant case, the evidence does not compel a finding in favor of appellant as a matter of law. As explained below, appellant failed to present uncontradicted, unimpeached evidence in support of the three *Kelsey S.* requirements for presumed father status.

The evidence showed that appellant never demonstrated a willingness to assume full custody of the twins. Before the twins were born, appellant and mother agreed that the twins would live with maternal grandmother at her house, not with appellant at his own home. Appellant specifically testified that he “needed that kind of assistance” for



the twins, thereby showing that he was unable and unwilling to take full custody of the twins. Other evidence confirmed appellant's disinclination to assume full custody: maternal grandmother stated that appellant did "not want to be involved with the babies," mother told a social worker that appellant was "not involved" in the twins' lives, and appellant failed to sign a declaration of paternity after the twins' birth. Thus, appellant did not prove his willingness to assume full custody of the twins. (See generally *In re Adoption of Myah M.* (2011) 201 Cal.App.4th 1518, 1540 [biological father failed to prove *Kelsey S.* requirement of willingness to assume full custody where he was "not able or willing to take immediate custody" of the child due to his "continued . . . use of drugs"]; *In re Elijah V.* (2005) 127 Cal.App.4th 576, 583 [biological father failed to prove *Kelsey S.* requirement of willingness to assume full custody where he "said he was in 'no position' to take" the child].)

The evidence also failed to establish that appellant promptly stepped forward to assume full parental responsibilities for the twins' well-being. Although there was evidence that appellant transported mother to prenatal appointments, publicly acknowledged paternity while mother was pregnant, and purchased items for the twins before their birth, there was no evidence that appellant attempted to assume full responsibility for the twins' well-being *after* their birth. Appellant was not present when the twins were born. He never visited the twins in the NICU. Upon learning of the twins' premature birth, he did not contact mother to inquire about the twins' health or the effects of mother's drug use on the twins. There was no evidence that he paid any of the medical bills associated with the twins' birth and hospitalization in the NICU. Appellant's lack of involvement with the twins after their birth shows that appellant did not promptly step forward to assume full responsibility for the twins' well-being. (See *Kelsey S., supra*, 1 Cal.4th at p. 849 [when determining presumed father status, a court must consider a biological father's conduct after a child's birth].)

Finally, contrary to appellant's assertion, neither mother nor hospital staff members prevented him from assuming his parental responsibilities after the twins' birth. Although hospital staff members twice prevented him from visiting the twins in the NICU because mother had failed to place him on the visitation list, the evidence established that appellant subsequently chose to withdraw from his parental responsibilities. After the second incident in which hospital staff members prohibited appellant from visiting the twins, mother told appellant that she would immediately place him on the visitation list. Mother placed appellant on the visitation list on November 2 or 3, 2012, yet appellant never visited the twins in the NICU. No one prevented appellant from visiting the twins after he was placed on the visitation list; rather, appellant admitted that he failed to visit the twins because he was not "getting along" with mother. Appellant's criminal activity and resulting arrest on November 10, 2012 further precluded him from assuming his parental responsibilities. Thus, the evidence demonstrated that it was appellant's own conduct and decisions—not the actions of a third party—that prevented appellant from assuming parental responsibilities. (See generally *In re Adoption of O.M.*, *supra*, 169 Cal.App.4th at p. 680 [considering a biological father's criminal activity and incarceration in concluding that there was no thwarting by third parties and holding that there is no "violation of equal protection or due process in holding an unwed father's own criminal activity against him when assessing whether he has met the criteria for *Kelsey S.* rights"].)

In summary, appellant failed to prove the three *Kelsey S.* requirements for presumed father status, and the evidence therefore does not compel a finding in favor of appellant as a matter of law. We accordingly conclude that the juvenile court properly denied appellant's motion to be declared the twins' presumed father.

***The Juvenile Court Did Not Misunderstand the Scope of Kelsey S.***

Appellant alternatively argues that the order denying his motion must be reversed because the juvenile court's comments show it was operating under a "mistaken belief that *Kelsey S.* only applies to parental rights termination litigation." This argument is unpersuasive.

At the close of evidence at the paternity hearing, appellant's counsel argued that appellant qualified for presumed father status under *Kelsey S.* Appellant's counsel also emphasized that biological fathers, such as appellant, should be protected from "court actions that would terminate their parental rights without a showing of unfitness." The juvenile court responded to counsel's arguments: "[Y]ou're asking the Court to find there's an exception, and that this case falls more squarely with the *Kelsey S.* sort of a due process argument, and the Court does not find that at all. We are not talking about terminating parental rights. The Court is simply here to determine the appropriate status of this Father of parenthood." The juvenile court then found that appellant was a biological father, but not a presumed father.

The juvenile court's comments regarding termination of parental rights appear to have been a response to counsel's argument regarding the potential termination of appellant's parental rights. We do not believe the juvenile court's comments evince a mistaken belief that *Kelsey S.* applied only to litigation regarding termination of parental rights. Rather, the juvenile court's comments simply addressed two of the arguments presented by counsel: proof of presumed father status under *Kelsey S.* and the potential termination of appellant's parental rights in the future. The circumstance that the juvenile court commented on these two concepts close in time does not compel us to conclude that the juvenile court mistakenly determined that *Kelsey S.* applied only in the context of the termination of parental rights.

Furthermore, even if the juvenile court’s comments did demonstrate that it misunderstood the scope of *Kelsey S.*, reversal would not be required. In determining whether to reverse or affirm, our “focus is upon the ultimate decision rather than the underlying analysis” of the juvenile court. (*In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1384.) As previously discussed, the juvenile court’s ultimate decision—that appellant failed to prove his status as a presumed father—was correct. Accordingly, the juvenile court’s comments regarding *Kelsey S.* and termination of parental rights cannot serve as a basis for reversal.

**DISPOSITION**

The order denying appellant presumed father status is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.